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In The Supreme Court of the United States

RONALD D. SKELTON.
Petitioner,
v.
SARA LEE CORPORATION,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

1. IN ORDER TO RESOLVE A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS THAT IMPLICATES THE SEVENTH AMENDMENT, THIS CASE PRESENTS THE FOLLOWING QUESTION:

   IN AN EMPLOYMENT DISCRIMINATION CASE, IN WHICH A PLAINTIFF ESTABLISHES A PRIMA FACIE CASE, WHETHER AN EMPLOYER'S FAILURE TO CONSISTENTLY ADHERE TO ITS OWN CRITERIA AND/OR ITS USE OF WHOLLY SUBJECTIVE CRITERIA IS SUFFICIENT TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT AS TO THE EMPLOYER'S ALLEGED REASONS SO AS TO PRECLUDE SUMMARY JUDGMENT ON AN AGE DISCRIMINATION CLAIM WHEN THERE IS OBJECTIVE EVIDENCE THAT THE PLAINTIFF WAS OTHERWISE SIGNIFICANTLY MORE QUALIFIED THAN YOUNGER EMPLOYEES RETAINED BY THE EMPLOYER DURING A REDUCTION IN FORCE.

LIST OF ALL PARTIES TO PROCEEDING BELOW

Ronald D. Skelton

Plaintiff

v.

Sara Lee Corporation

Defendant

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INTRODUCTION

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-entitled proceeding filed on October 3, 2007.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported.

The opinion of the United District Court for the Southern District of Ohio has not been reported.

STATEMENT OF JURISDICTION

Petitioner filed his Complaint seeking damages and injunctive relief for claims alleging age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* and the Ohio Revised Code § 4112.14 (formerly codified at § 4101.17) in the United States District Court for the Southern District of Ohio on April 16, 2003. Jurisdiction of the district court was based upon 28 U.S.C. §§ 1331, 1367.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States. . . ."

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a), provides:

> It shall be unlawful for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

STATEMENT OF THE CASE

Petitioner Ronald Skelton began working for Sara Lee in 1979. He became a Planner in January 1985, the position he held in Sara Lee's Transportation department until his termination in 2002. Skelton was a stellar performer with a long and continuous history of excellent performance reviews and merit increases. From 1991 to 2000, Skelton's performance met or exceeded requirements.

In 1998, Sara Lee transferred Skelton to its Spring Grove facility in Cincinnati, Ohio. That same year, the transportation planning division implemented a new software system called "Manugistics." Skelton was able to navigate through

the transition from "manual planning" to the software system, excelled at using the Manugistics system for transportation planning, and worked independently of his manager.

In 1999, Skelton's performance exceeded expectations. He was "willing to be a team player and work with whomever to get the job completed." Skelton "took on a leadership role in training and development of the assistant planner, resulting in immediate benefit and gain for the department." Skelton exceeded expectations in the area of interpersonal skills and team building, was a team player, and continued to show his "ability to lead." Skelton also exceeded expectations for initiative, projecting a positive attitude, receptiveness to change, and willingness to work hard to affect change. Bob Turner, Skelton's supervisor, believed that Skelton could have the ability to take his position in the future.

In short, Skelton was a very knowledgeable, efficient and cost-conscious team player. But despite his stellar record and long service, Sara Lee terminated Skelton in an alleged reduction in force ("RIF") at the same time it retained significantly

younger employees in positions for which Skelton was qualified.

In 2000, Sara Lee centralized all traffic planning functions in its Spring Grove facility in Cincinnati. During the centralization process, Skelton "took the lead" on projects and trained new Planners.

In 2001 and 2002, Sara Lee hired at least eight new Planners at its Spring Grove facility "from the outside." The new Planners did not receive the comprehensive training on the Manugistics system that Skelton had completed. As the most experienced Planner, Skelton was called upon to provide on-the-job training to the new Planners and served as a resource for other Planners because they were relatively new to their jobs. Joyce Humphrey, Skelton's former supervisor, testified that:

> A lot of people asked Ron a lot of questions. When they had questions on maybe how to put something together, or what carrier to use, a lot of the Planners would go to Ron.

In February, 2002, Skelton's performance review reflected that he "always made himself accessible to

anyone in the LCC [Load Control Center] who needed his assistance," including "assisting other load planners in their daily functions" and that he "communicate[d] well between the warehouses, carriers and customer service." Skelton was assigned as the team leader to the Jimmy Dean Foods ("JDF") division, because the company needed its most experienced planner in one of its most difficult warehouses.

Two new Planners, Jeff Granville and David Romie, were assigned to the JDF project as they were hired. Skelton's understanding of the company and knowledge of the warehouse operations were invaluable to the training of the new Planners and the success of the JDF project. In fact, Jimmy Dean's Customer Service Manager wrote to Larry Rogers, V.P. of Transportation, in August, 2002, that Skelton was doing a "wonderful job for Jimmy Dean Foods" and that he was a "great asset to the team."

Seven months after his annual performance review and merit increase in February, 2002, Skelton received another performance review. Russ Gibson, Planner supervisor, rated Skelton as "exceeding

expectations" and noted that Skelton was a "great planner" with "solid carrier relations."

In 2002, Sara Lee decided to return the remainder of its transportation planning functions to a decentralized process, in which planning would occur from several mixing centers, including Spring Grove in Cincinnati, the Claryville plant in Alexandria, KY, and centers in Arizona, Pennsylvania, Illinois, Texas, and later Atlanta, GA.

Pat Cooper, V.P. of Employee and Labor Relations, had learned of the plans from Rogers sometime in August or September, 2002. In making decisions as to which Planners to retain, Cooper advised Rogers to set specific criteria, interview every Planner, and apply the same criteria to every interviewee. *The goal of the interviews was to retain the Planners who could best service the customers, i.e.*, the most qualified Planners. An employee's ability to use the Manugistics program was one of the criteria for retention.

Rogers had meetings at Spring Grove, with Humphrey, Gibson and Lower (a consultant), to determine criteria for determining which Planners

would be terminated. Although Lower believed this meeting took place after October 7, 2002, it would have had to have been before, because Gibson, who refused to participate after he learned of his own impending termination, was in attendance. It is undisputed that interviews began on October 10. It is improbable that interview questions could be developed and reviewed by HR, interviews scheduled, and Planners informed of the requirements for an interview on October 8 and 9 alone. Furthermore, there is testimony from Sara Lee that the Planners were told at the October 7 meeting that they would need to interview and they could not have been informed if the decision to interview had not yet been made.

Rogers indicated that the group would need to "identify which individuals were ... 'high-performing,' high-performance individuals, and which ones were not performing well." The group allegedly decided to get input from Customer Service and to interview the Planners before making decisions. Nonetheless, Humphrey created a list which categorized the 18 Planners as "Keepers," "In-Betweeners," or "Definitely Nos."

On the evening of October 7, 2002, Dan Siefring interviewed with Larry Rogers for a management position, with responsibilities including supervision of the Spring Grove Planners. Siefring learned in the interview with Rogers that already the "lines were drawn out on which Planners were going to leave" and which of the 18 Planners would remain.

The decision-makers were well aware that Skelton had the most experience at Sara Lee among all the Planners and that most of the Planners retained were inexperienced because they had been there less than a year. The decision-makers also knew of the value of such experience. Nonetheless, Sara Lee terminated Skelton in spite of his leadership skills, his efficiency and his superior experience and retained the following Planners who were indisputably less qualified than Skelton.

Jennifer Little age 27

Jennifer Little had been with the company for less than a year as a Planner. In that time, she was placed on a Performance Improvement Plan (PIP) by her supervisor, Joyce Humphrey. At Sara Lee, an employee was placed on a PIP after he or she had

previously received verbal or written counseling. Humphrey had counseled Little both verbally and in writing regarding her attitude and her inability to hold her temper.

In fact, Sara Lee admits that because she was "younger, she needed some coaching on watching her mouth, because she was rather young." Furthermore, Little's overall performance rating of "2" was no greater than that of Skelton's. Little was taken off her PIP by Humphrey during her performance review with Humphrey, just two business days before her "interview" with Rogers and Humphrey.

Roberta Mosher age 37

Roberta Mosher, age 37, the next most experienced Planner (with a little under three years' experience), had been placed on a PIP in 2002. Gibson and Humphrey rated her a "2" on September 23, 2002, as she "struggled to cope with her day to day responsibilities" and needed improvement on stress and time management, had to be reassigned twice in 2002 because of stress issues; was the subject of "complaints from outside the department regarding her accessibility;" received no better 2002

performance rating in Leadership than Mr. Skelton; was told she "needs to work on leadership skills either through company training or outside programs"; and was not asked to take on a mentoring or leadership role as was Mr. Skelton. Despite these extensive performance problems, Mosher was taken off her PIP on October 10, 2002, the same day she interviewed with Joyce Humphrey.

In fact, the decision-makers were well aware of these issues when it decided to retain Mosher. Sara Lee was concerned that she "got frazzled sometimes," "didn't handle pressure well," and "got hysterical and cracked under pressure." It was a "no-brainer" that Mosher should not "make the cut."

Chuck Chernock age 31

Chernock had been with the company for only a year and a half; less than a year as a Planner. He was not a good Planner, was not a "go-getter," and had been caught playing video games during work. In fact, Gibson, who provided input to the decision-makers, found it a "no-brainer" that Chernock would be terminated.

Chernock's supervisor admitted that he was no better a Planner than Skelton. However, Chernock was objectively not as good of a Planner. Although he received an overall "2" rating on his performance evaluation, he had been counseled regarding his "unwillingness to accommodate special requests from Customer Service" and his "temperament when dealing with these issues." He had displayed outbursts with internal customers and his supervisor. Just three weeks before Sara Lee decided to retain Chernock, his supervisor noted that he was "often late for work" and needed to develop better leadership skills, a more professional demeanor and a higher level of maturity.

Mike Jones age 32

Mike Jones had worked for Sara Lee for only seven months, and had been a Planner for Sara Lee since July 15, 2002. Jones had been in the position of Planner for only 10 weeks when he received his performance review, from his *previous* supervisor, Mark Funk, who supervised Jones when he was a Loss and Damage Prevention Analyst. Although Jones had been given an overall rating of "1," Jones had no prior experience in transportation planning,

in contrast to Skelton's 17 years of experience.

Wayne Ross age 32

Ross had less than three *months* of experience as a Planner and had never had a performance review. Not surprisingly, Skelton was a more knowledgeable Planner than Ross.

Joe Kelley age 33

Kelley had only two months of experience with the company and as a Planner; he had never even had a performance evaluation. Both Planner supervisors, Joyce Humphrey and Russ Gibson, testified that Skelton was a better Planner. Kelley also required longer to do his work than did Skelton.

David Romie age 36

Romie had been with the company for only four months as a Planner and had never received a performance review. Although Romie had prior experience in transportation, he did not possess Skelton's extensive knowledge of Sara Lee's

organization. Furthermore, Romie had never received a performance review by Sara Lee.

Mark Voiers age 39

Voiers had been with the company for less than one year as a Planner. In contrast to Skelton's 17 years of Planner experience, Voiers had less than two years' experience as a Planner at The Gap, where he had worked with Joyce Humphrey.

Heather McGraw age 24

McGraw "an obvious selection for termination," received consideration for a position in Customer Service in the Blue Ash decision-making meeting. McGraw, even though categorized as a Definitely-No, indicative that she was one of the "weakest employees, performers," was considered by the decision-makers for a "possible fit into Customer Service" and was hired for a position there.

It is undisputed that eight significantly younger Planners were retained by Sara Lee rather than Skelton, to perform the work of Planners in Sara Lee's Spring Grove or Claryville facilities. It is also

undisputed that at the time these Planners were preferred over Skelton, none had greater experience as a Planner or with the company, two had recently been placed on a PIP and others had performance issues that were of concern to the decision-makers.

On the other hand, it is undisputed that Skelton had an exemplary work record, was never subject to a PIP, and that Skelton's performance as a Planner was wholly successful.

Sara Lee alleged that it selected Skelton for termination because it wanted to retain the employees who were willing to work long hours. No objective evidence was presented that any of the retained planners had worked long hours or were willing to work longer hours. Likewise, Skelton's 2001 performance review noted that his knowledge and skills were so developed that he had "the ability to complete his daily tasks and also pre-plan days in advance" and due to his "vast experience...he [could] easily problem-solve load planning issues." Moreover, there is no evidence that Skelton ever indicated that he was not willing to work longer hours if necessary.

Although Sara Lee had already made the decision as to which Planners would be terminated by October 7, all Planners were interviewed between October 10 and 15, 2002. Humphrey drafted interview questions, which Monica Mehta, Human Resources Manager, "looked over real quickly."

The interviews were conducted by Joyce Humphrey, one of the Planner supervisors, and Rogers, who had very little first hand knowledge of the day-to-day performance of the Planners. Russ Gibson, the Department's other Planner supervisor, had been already been informed that he would be losing his job. Therefore, he refused to participate in the interviews. Gibson provided input to Joyce Humphrey about some of the Planners, including Skelton.

On October 18, 2002 Skelton was notified that he would be terminated from his position effective February 28, 2003. Sara Lee provided assistance to younger Planners in finding alternate employment with Sara Lee. However, despite Skelton's qualifications to be a Planner in other cities and his repeated indication that he was willing to relocate, Sara Lee provided no assistance to Skelton.

Following up on Gibson's lead, Skelton inquired of Turner about employment at the Claryville plant, where he was providing cross-coverage, but Turner did not respond to his inquiry. Skelton searched "daily" on the Sara Lee website for opportunities at Spring Grove, but was unable to find comparable positions, and the Planner positions at the other mixing centers were not posted. Although Sara Lee contends that "scores of positions" were available on Sara Lee's intranet website, Sara Lee does not identify what these positions were or whether they were in any way comparable to Skelton's current position. Furthermore, Sara Lee produced no evidence that the regional mixing center Planner positions were ever posted on Sara Lee's internal website, indeed, many of these positions were not posted until after Sara Lee was terminated, when Skelton no longer had access to the site.

Notably, the three oldest Planners in the department, were selected for termination.

REASON FOR ALLOWANCE OF THE WRIT

The decision of the Sixth Circuit in Skelton v. Sara Lee Corp., has raised important questions as to

the method and sufficiency of evidence of inconsistent, subjective or haphazard processes employed in making termination decisions in a RIF to establish a question of fact as to pretext in an employment decision case.

The Tenth, First and D.C. Circuit Courts of Appeal have all enunciated rules allowing an employee terminated in a RIF to establish pretext by demonstrating that the employer failed to follow its own RIF procedure, adhere to its own criteria, or employ subjective criteria for making employment decisions. The Sixth Circuit in Skelton, however, categorically rejected such evidence presented by the employee as even probative of pretext.

On the other side of this split is authority from the Seventh, Ninth and Eleventh Circuit which rejects the notion that wholly subjective criteria in employment decisions is relevant to the question of pretext. Instead, according to these circuits a court must not substitute its own judgment for the business judgment of the employer.

ARGUMENT

I. IN AN EMPLOYMENT DISCRIMINATION CASE PURSUANT TO THE ADEA, IS AN EMPLOYER'S FAILURE TO CONSISTENTLY ADHERE TO ITS OWN CRITERIA, EMPLOY WHOLLY SUBJECTIVE OR FAULTY ANALYSIS, OR FOLLOW ITS OWN PROCESS WHEN DETERMINING WHICH EMPLOYEES TO TERMINATE IN A REDUCTION IN FORCE ("RIF") CASE SUFFICIENT TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT REGARDING PRETEXT?

A. The Decision Below Implicates The Seventh Amendment And Raises Important Questions Regarding A Discrimination Plaintiff's Ability To Present His Case To The Fact-Finder.

When the Sixth Circuit ignored the authority in Reeves prohibiting the Court from weighing evidence in favor of the employer and applying a pretext plus standard in affirming summary judgment, it usurped the role of the jury as factfinder. In doing so, it

violated Skelton's Seventh Amendment[1] right to a jury trial. See Lorillard v. Pons, 434 U.S. 575 (1978).

The Seventh Amendment preserves an important and valuable right: "the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." J. Story, Commentaries on the Constitution of the United States 1762 (1833). Its primary purpose is to distinguish between issues of law, to be resolved by the court, and issues of fact, which are to be determined by the jury. Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935).

When deciding a Rule 56 motion, which, if granted would deny a plaintiff a jury trial, "although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves v. Sanderson Plumbing, 530 U.S. 133, 151 (2000).

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[1] The Seventh Amendment to the United States Constitution provides "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States. . . ."

"That is, the court should give credence to the evidence favoring [Plaintiff] as well as that evidence supporting [Defendant] that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." Id. (emphasis added).

In St. Mary's Honor Ctr. v. Hicks, this Court envisioned that the ultimate issue of whether an employer had engaged in prohibited discrimination, once a discrimination plaintiff had established a *prima facie* case and evidence of pretext, was a question of fact that must be resolved by the jury. 509 U.S. 502, 511 (1993) ("the trier of fact proceeds to decide the ultimate question" as soon as the plaintiff establishes a prima facie case and the defendant rebuts the presumption by articulating its explanation for the adverse action). Thus, when a plaintiff has produced evidence sufficient to discredit the employer's explanations for its action, then the jury *may*, based on this evidence of pretext coupled with the evidence used to establish the prima facie case, infer that discrimination occurred. Id.

Although Hicks was not a Seventh Amendment case,[2] this Court implicitly recognized that it would be improper for a reviewing court to enter judgment as a matter of law for the defendant when a plaintiff proved pretext and a prima facie case, by explicitly holding that entering judgment as a matter of law for the *plaintiff* in that situation was improper. Id.

Here, the Skelton Court weighed evidence in favor of the movant when it accepted, as true, testimony from the movant's witnesses that it selected Skelton for termination because of an alleged unwillingness to work longer hours and disregarded his evidence that it had been unnecessary for him to work these longer hours because of his efficiency in completing his work.

In holding at the summary judgment stage, that Skelton must point to evidence sufficient to make the factfinder "believe the plaintiff's explanation of intentional discrimination," the Court further ignored the authority of Reeves. Specifically, the Court ignored Reeves admonition that, a plaintiff survives

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[2] Hicks was tried to a judge as factfinder because the Civil Rights Act of 1991, which provided for jury trials of Title VII claims, had not yet been passed at the time of trial. 509 U.S. at 505.

summary judgment when he establishes a prima facie case and evidence that creates a genuine issue of material fact as to pretext.

This Court should grant Certiorari in this case to clarify that, in cases where discrimination plaintiffs have produced evidence of a prima facie case and pretext, a jury question is created, which is protected by the Seventh Amendment.

B. There Is A Split In The Circuits Regarding The Probative Value Of Evidence Of An Employer's Flawed Or Subjective Process For Conducting A RIF.

In analyzing the sufficiency of evidence of pretext in RIF cases, the Circuits are split regarding whether evidence of a flawed, inconsistent, or subjective RIF process is probative of or sufficient to establish a genuine issue as to whether an employer's articulated reasons are pretext for unlawful discrimination.

In Beaird v. Seagate Tech. Inc., the Tenth Circuit laid out three avenues for showing that an employer's articulated reason for termination is pretext for age

discrimination. According to the Beaird Court, a plaintiff can "argue that her own termination does not accord with the RIF criteria supposedly employed." For example, a defendant's failure to comply with its own RIF policy may suffice to show pretext. "Second, a plaintiff can adduce evidence that her evaluation under the defendant's RIF criteria was deliberately falsified or manipulated so as to effect her termination or otherwise adversely alter her employment status. Third, "a plaintiff can adduce evidence that the RIF is more generally pretextual." 145 F.3d 1159, 1168 (10th Cir. 1998). See also, Simms v. Oklahoma, 165 F.3d 1321, 1328 (10th Cir. 1999). The Tenth Circuit in Pippin v. Burlington Res. Oil & Gas Co., 440 F.3d 1186, 1193 (10th Cir. 2006) held similarly. Although the Pippin Court affirmed summary judgment in favor of the defendant, it recognized that a plaintiff could demonstrate pretext by showing the a termination does not accord with the defendant's RIF criteria. See also, Webb v. Communications, LLC, 167 Fed. Appx. 725, 729 (10th Cir. 2006); Gilkey v. Siemens Energy & Automation, Inc., 125 Fed. Appx. 908, 911 (10th Cir. 2005). Likewise, the District Court in Shuffit v. Gear Products, Inc., 2007 US Dist. LEXIS 72442, *18-19 (D. OK), held that a plaintiff can show pretext by

showing that a defendant failed to follow its own RIF policy.

In related analysis, the Tenth Circuit has consistently held that subjective criteria used by employers in making termination decisions during a reduction in force is at least probative of pretext sufficient to defeat summary judgment. In Zuniga v. Boeing, 133 Fed. Appx. 570, 574 (10th Cir. 2005) the Court considered evidence that the scores used to make RIF choices were inconsistent with prior performance evaluations. According to the Zuniga Court, the Tenth Circuit has "stressed that subjective judgments are viewed with skepticism in the pretext inquiry." Citing Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1217-18 (10th Cir. 2002) ("collecting cases and holding that subjectivity by decision-maker in termination decision is relevant evidence of pretext."); Simms v. Oklahoma, 165 F.3d 1321, 1328 (10th Cir. 1999) ("Evidence of pretext may include . . . the use of subjective criteria."); Bauer v. Bailar, 647 F.2d 1037, 1046 (10th Cir. 1981) ("stating that, although subjective criteria is not wrongful *per se*, 'obviously subjective decision making provides an opportunity for unlawful discrimination.'") Relying on such precedent, the Zugia Court recognized the

"numerous [holdings] that a plaintiff can defeat summary judgment by demonstrating that an evaluation offered to justify his termination conflicts with other assessments of his work performance." Id. at 574-575, citing Garrett, 305 F.3d at 1219; Greene v. Safeway Stores, Inc., 98 F.3d 554, 564 (10th Cir 1996); Cole v. Ruidoso Municipal Schools, 43 F.3d 1373, 1380 (10th Cir. 1994).

In Concert with the Tenth Circuit are decisions in the D.C. Circuit and the First Circuit holding that the subjective nature of an employer's may mask discrimination, making it a question probative of pretext. A D.C. district court in Gipson v. Wells Fargo N.A., 460 F.Supp.2d 15, 26 (2006) cited the *en banc* decision in Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 11298 (D.C. Cir. 1998) to deny summary judgment to an employer. According to the Gipson Court, the D.C. Circuit held that where "a jury may reasonably find a plaintiff was otherwise significantly better qualified than the chosen applicant. 'an employer's strong reliance on subjective feelings about the candidates may mask discrimination. Indeed . . .an employer's heavy use of 'highly subjective' criteria, such as 'interpersonal skills,' could support an inference of discrimination."

In Jackson v. Gonzales, 496 F.3d 703, 709 (D.C. Cir. 2007) the D.C. Circuit noted that, while it would not second guess the how an employer weighs particular factors in the hiring decision, it should be "of course cautious in accepting such purely subjective explanations when the plaintiff is otherwise significantly better qualified." Citing Aka, 156 F.3d at 1294.

In Gipson, 460 F.Supp.2d at 26, the Court considered evidence presented by the Plaintiff of her evidently superior qualifications in comparison to a chosen candidate. The plaintiff had a master's degree, several years of loan origination experience, at least two years of management experience, and a positive work reputation. The chosen candidate had only a bachelors degree and less experience originating loans. The Gipson Court conclude that although "the differences in qualifications between the plaintiff and [the chosen candidate] may fall short of overwhelming, the differences are significant enough to support a jury determination that plaintiff was significantly better qualified for the branch manager." The Gipson Court coupled this evidence with evidence of the subjective nature of the

employers criteria to deny summary judgment. Id. at 26.

The First Circuit in Koster v. TWA, 181 F.3d 24, 32 (1999), relied on Aka to affirm the district court's denial of summary judgment. In affirming a denial of summary judgment, the Koster Court noted that the jury could conclude that the plaintiff was significantly more qualified than the chosen candidate and cited the Aka Court's admonition that an "employer's asserted strong reliance on subjective feelings about candidates may mask discrimination." Aka, F.3d at 1297.

In direct opposition to the analysis of the Tenth, D.C. and First Circuits, the Seventh, Ninth and Eleventh Circuits all reject the premise that a subjective or flawed RIF process are sufficient to, or even probative of, pretext. For example, the Seventh Circuit, considering the plaintiff's claims that the defendant manipulated data and ignored years of service and positive past performance evaluations in order to rank her lower was not to sufficient to establish a genuine issue as to pretext and survive summary judgment. Gagen v. Continental Casualty Company, 2007 U.S. Dist. LEXIS 42, *1, *12-13 (N.D.

Ill. 2007); See also, Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672, 677 (7th Cir. 1997).

The Seventh Circuit similarly rejected evidence of a faulty process as sufficient to establish pretext. In Cowan v. Glenbrook Security Services, 123 F.3d 438, 445-446 (1997), the Seventh Circuit held "it is not the court's "province to second guess the business judgment of [a defendant] where . . . it acted on ample legitimate justification for [terminating] the plaintiff. In Kariotis, 131 F.3d at 677, the Seventh Circuit held that "an opportunity for rebuttal [of the defendant's reasons] is not an invitation to criticize the employer's evaluation process or simply to question its conclusions about the quality of an employee's performance." In short, according to the Seventh Circuit, the Court cannot sit as a super-personnel department by second-guessing the judgment of an employer in conducting its RIF process. See also, Debs v. Northeastern Illinois University, 153 F.3d 390, 396 (7th Cir. 1998).

In Millbrook v. IBP, Inc., 280 F.3d 1169 (7th Cir. 2002), the Court reversed a jury verdict in favor of the plaintiff when it reversed the district court's denial of the defendant's motions for judgment as a

matter of law. In so holding, the Millbrook Court quoted Eleventh Circuit authority that "absent evidence that subjective hiring criteria were used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext." quoting, Denney v. City of Albany, 247 F.3d 1172, 1186 (11th Cir. 2001). See also, Hall v. City of Chicago, 52 Fed. Appx. 259, 263-264 (7th Cir. 2002); Guice v. R.R. Donnelley, 1997 U.S. App. LEXIS 30221, *1, *4 (7th Cir. 1997).

The Ninth Circuit agreed with such analysis, holding in Coleman v. The Quaker Oats Co., 232 F.3d 1271, 1285 (9th Cir. 2000) that the employees terminated in a RIF could not establish an inference of pretext by showing that Quaker made unwise business judgments or that it used a faulty evaluation system. See also, Hamerlink v. Robert Mondavi Winery, 2002 U.S. Dist. 6753, *15. (N.D. CA.) Similarly, the Coleman Court , in affirming summary judgment in favor of the defendant and rejecting the plaintiff's reliance on subjectivity to prove pretext, held that any probative value of the use of subjective evaluations is weak. Coleman, 232 F.3d at 1285.

The Eleventh Circuit likewise agreed, holding provided "that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on an rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000) citing Alexander v. Fulton County, Ga., 207 F.3d 1303, 1341 (11th Cir. 2000).

The Sixth Circuit has approached the question of flawed or subjective RIF processes in several conflicting ways. In this case, the Court rejected evidence that the employer failed to follow its own process for deciding which employees to retain or terminate as probative of pretext. 2007 U.S. App. LEXIS 23521, *30-35; Appx. at A-40-A-45. It likewise acknowledged the question of fact the employee had established as to whether the employee consistently followed its own criteria in implementing its RIF. Id. at *30-31; Appx. at A-40-A-42. However, the Skelton Court dismissed this factual dispute as not probative of pretext.

The Skelton Court held that even assuming that the employer's process was haphazard and imperfect,

in the failure of the decision makers to take notes on some, but not all the interviews of employees considered for retention, such evidence was simply irrelevant to the question of pretext. Skelton, 2007 U.S. App. LEXIS 23521, at *32-35; Appx. at A-42-A-45.

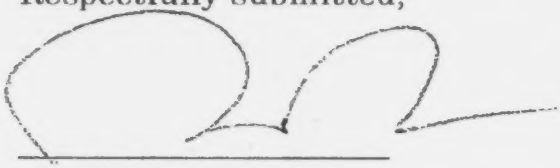
In stark contrast, the Sixth Circuit in Blair v. Henry Filters, reversed summary judgment in a case involving a suspect RIF process in a decision issued just weeks earlier. According to the Blair Court, the record revealed neither a defined beginning date for, nor a clear plan for the execution of the RIF. The Sixth Circuit held that this "lack of an objective plan for the reduction-in-force creates a genuine issue of material fact regarding whether [its] explanation is credible." 505 F.3d 517, (6th Cir. October 15, 2007). In so holding, the court noted "[w]e have previously indicated that a 'lack of evidence regarding a company's objective plan to carry out a reduction in force' is a "factor that might indicate that an alleged reduction in force is pretextual." Quoting Godfreson v. Hess & Clark, Inc., 173 F.3d 365, 374 (6th Cir. 1999); citing Hillebrand v. M-Tron Indus. Inc., 827 F.2d 363, 367-68 (8th Cir. 1987). The Blair Court specifically took issue with the absence of a

"blueprint" for the employer's RIF and the chaotic nature of the of the RIF. Id. at 43. The Blair Court concluded that this "lack of an objective plan, coupled with [the plaintiff's] circumstantial evidence of age discrimination would permit a reasonable fact-finder to conclude that [the defendant's] proffered non-discriminatory reason for terminating [the plaintiff] was a pretext for discrimination." Id.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

Opinion,
filed 10/03/07 ..... A1- A46

SOUTHERN DISTRICT OF OHIO FILINGS:

Opinion and Order,
filed 07/31/06 ..... B1 - B18

Judgment,
filed 07/31/06 ..... C1 - C2

RONALD D. SKELTON, *Plaintiff-Appellant,*
v.
SARA LEE CORPORATION,
Defendant-Appellee.

No. 06-4234

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

07a0708n.06; 2007 U.S. App. LEXIS 23521;
2007 FED App. 0708N (6th Cir.);
101 Fair Empl. Prac. Cas. (BNA) 1464

October 3, 2007, Filed

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PRIOR HISTORY: [*1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

Skelton v. Sara Lee Corp., 2006 U.S. Dist. LEXIS 52482 (S.D. Ohio, July 31, 2006)

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

[HN1] An appellate court reviews de novo a district court's grant of summary judgment.

Civil Procedure > Summary Judgment > Standards > General Overview

Civil Procedure > Summary Judgment > Standards > Appropriateness

[HN2] A motion for summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). When faced with a summary judgment motion, a district court must view all

evidence and the inferences to be drawn therefrom in the light most favorable to the non-moving party. The critical inquiry for a district court is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Labor & Employment Law > Discrimination > Age Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Circumstantial Evidence
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Direct Evidence
[HN3] Under the Age Discrimination in Employment Act (ADEA), 29 U.S.C.S. § 621 et seq., employers are prohibited from discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. 29 U.S.C.S. § 623(a). Direct evidence of age discrimination is that evidence, which if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. Circumstantial evidence, on the

other hand, is proof that does not on its face establish discriminatory animus, but does allow a fact finder to draw a reasonable inference that discrimination occurred.

Labor & Employment Law > Discrimination > Age Discrimination > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Circumstantial Evidence
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Direct Evidence
[HN4] The dividing line between direct and circumstantial evidence is murky at best. Direct evidence has often been defined as evidence which, if believed, suffices to prove a fact at issue without inference or presumption. Where a plaintiff succeeds in presenting direct evidence of a discriminatory motive, the burden of production and persuasion shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive.

Labor & Employment Law > Discrimination > Age Discrimination > Proof > Direct Evidence

[HN5] Statements allegedly showing an employer's age bias are to be evaluated by considering four factors: (1) whether the statements were made by a decision-maker or by an agent within the scope of his employment; (2) whether the statements were related to the decision-making process; (3) whether the statements were more than merely vague, ambiguous or isolated remarks; and (4) whether they were made proximate in time to the act of termination. None of these factors is individually dis-positive of age discrimination, but rather, they must be evaluated as a whole, taking all of the circumstances into account.

Labor & Employment Law > Discrimination > Age Discrimination > Proof > Direct Evidence

[HN6] Temporal proximity alone cannot establish the requisite causal nexus between the employee's protected activity or status and the adverse action.

Labor & Employment Law > Discrimination > Age Discrimination > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Circumstantial Evidence

[HN7] Courts are guided by the McDonnell Douglas burden-shifting framework to analyze age discrimination claims based upon circumstantial evidence. First, an employee must establish a prima facie case of age discrimination. Once an employee satisfies this burden, the bur-den of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the employer is able to do so, the burden shifts back to the employee to rebut the employer's proffered reason by showing by a preponderance of the evidence that the employer's articulated reason was a pretext for intentional age discrimination. Importantly, the burden of persuasion remains on the employee. However, the employer's alleged nondiscriminatory reason for taking an adverse employment action may not be considered by a court when analyzing the prima facie case.

Labor & Employment Law > Discrimination > Age Discrimination > Proof > General Overview
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Circumstantial Evidence
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Direct Evidence
[HN8] Pursuant to the McDonnell Douglas formula, to establish a prima facie case of age discrimination, an employee must show the following elements: (1) he was a member of the protected class (i.e., age 40 or over); (2) he was qualified to perform the job; (3) he was subject to an adverse employment action; and (4) he was replaced by a younger individual. However, where an employee's position is eliminated pursuant to a reduction in force (RIF) or reorganization, the analysis with regard to the fourth element differs because the employee is not re-placed. By showing only the first three elements of the McDonnell Douglas formula, an employee has not presented any evidence indicating that the work force reductions are not the reasons for the discharge. Thus, in a RIF or reorganization case, the employee does not make out a prima facie case absent additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff

for discharge for impermissible reasons (the "fourth element" or the "Barnes additional evidence requirement").

Labor & Employment Law > Discrimination > Age Discrimination > Proof > General Overview
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Burdens of Proof
[HN9] An employer's alleged nondiscriminatory reason for taking an adverse employment action may not be considered by a court when analyzing the prima facie case. That is, a court must sustain clear boundaries when assessing the three stages of the McDonnell Douglas burden-shifting analysis.

Labor & Employment Law > Discrimination > Age Discrimination > Proof > Burdens of Proof
[HN10] In the context of the McDonnell Douglas framework, a plaintiff may prove pretext by showing that the employer's proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to motivate the employer's challenged conduct. The first type of rebuttal consists of evidence that the reasons given by the employer simply did not happen. The third type ordinarily consists of evidence that other

employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff. It is the employee's burden, not the employer's, to show that he was superior to a retained employee with regard to the employer's asserted criteria.

Labor & Employment Law > Discrimination > Age Discrimination > Proof > General Overview
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Circumstantial Evidence

[HN11] A plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. An employer's changing rationale for making an adverse employment decision can be evidence of pretext. It is not enough to disbelieve the employer, the fact finder must believe the plaintiff's explanation of intentional discrimination.

Labor & Employment Law > Discrimination > Age Discrimination > Proof > General Overview
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Burdens of Proof
[HN12] Mere conjecture that the employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment.

Labor & Employment Law > Discrimination > Age Discrimination > Federal & State Interrelationships
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN13] When analyzing claims arising under Ohio Rev. Code § 4112, Ohio courts have adopted the framework established in federal case law concerning Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, 29 U.S.C.S. § 621 et seq.

COUNSEL: For RONALD D. SKELTON, Plaintiff - Appellant: Randolph H. Freking, Heather M. Schisler, Freking & Betz, Cincinnati, OH.

For SARA LEE CORPORATION, Defendant Appellee: Deborah S. Brenneman, Thompson Hine, Cincinnati, OH.

JUDGES: Before: BATCHELDER, GRIFFIN, Circuit Judges; ACKERMAN, District Judge. *

> * The Honorable Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

OPINION BY: HAROLD A. ACKERMAN

OPINION

HAROLD A. ACKERMAN, District Judge.

After Sara Lee Corporation discharged Ronald Skelton in a reduction in force, Skelton alleged age discrimination in violation of Ohio and federal law. Skelton appeals from the District Court's grant of summary judgment in favor of Sara Lee Corporation. Because Skelton has not satisfied the third stage of

the *McDonnell Douglas* burden-shifting framework, we **AFFIRM**.

I.

Plaintiff-Appellant Ronald D. Skelton began working for Defendant-Appellee Sara Lee Corporation in 1979. In January 1985, Skelton became a load planner (hereinafter "Planner") within Defendant's Transportation Department, a position he held until the effective termination of his position [*2] on February 28, 2003. At the time of the termination of his position, Skelton was 46 years old. He now appeals the District Court's grant of summary judgment in favor of Defendant on his claims for age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, and Ohio's age discrimination statute, Ohio Revised Code Chapter 4112.

Defendant manufactures and markets numerous brand-name food products, such as Hillshire Farms, Sara Lee, Jimmy Dean, and Ballpark. Defendant's Transportation Department is responsible for distributing products from the several production facilities where products are made to a handful of regional warehousing and distribution facilities, or "mixing centers." From these mixing

centers, combinations of products are loaded onto trucks for shipments to customers. As a Planner, Skelton was primarily responsible for "building loads," i.e., selecting the carrier for each shipment and the most efficient arrangement of orders on the trucks to ensure the lowest possible costs to customers. Planners are responsible for dealing with frequent carrier problems, miscommunications, and other complications.

Prior to 2000, Defendant [*3] did not operate centralized mixing centers. Defendant's nine primary brands operated as independent companies, each with its own Planners located at the various production facilities who managed the transportation of products directly from the production facilities to the customers. In an apparent effort to improve efficiency and increase customer satisfaction, Defendant made drastic changes to its business model in the beginning of 2000, including the creation of five regional mixing centers. During this reorganization, Defendant also centralized all of its Planners by moving them to the Spring Grove, Ohio, facility. From Spring Grove, Planners would remotely manage the transportation of products from the five regional mixing centers to grocery stores. As a result of the reorganization, the Planner positions that

existed at Defendant's production facilities were eliminated, and many Planners were laid off. Defendant also hired several new Planners during the first half of 2002 to operate the newly centralized Spring Grove facility. Skelton was not laid off at this time be-cause he had already been working as a Planner in Spring Grove. Thus, Skelton began working in the new, centralized, [*4] Transportation Department.

Defendant soon learned that the centralization of its transportation functions was not successful. Apparently, Planners had greater difficulty dealing with day-to-day transportation problems by phone or email from Spring Grove, as compared with operating on-site. Thus, in the Fall of 2002, Defendant decided to decentralize load planning by relocating the Planners to the five mixing centers. At that time, Defendant employed seventeen Planners at the Spring Grove facility; thus, several positions needed to be eliminated at the Spring Grove facility.

In early October 2002, Larry Rogers, Vice President of Transportation, discussed the plan to decentralize the load planning function with Phil Lower, Russ Gibson and Joyce Humphrey. Lower, a consultant hired to address problems in the department, had worked directly with several of the

Planners in Spring Grove in the preceding months. Gibson and Humphrey were managers who directly supervised the Planners, including Skelton. On October 7, 2002, Rogers and Monica Mehta, Defendant's Human Resource Manger, met with the entire department, including the Planners, to inform them of the decision to decentralize. Rogers explained [*5] that several Planner positions would be eliminated in Spring Grove and new Planners would be hired in the regional mixing centers. Rogers announced that the Planners would be required to interview for the positions that would remain in Spring Grove and that those Planners who were not retained could apply for the positions being created at the mixing centers.

The following week, Rogers and Humphrey inter-viewed every Planner, including Skelton. Rogers, Humphrey, and Lowers met after the interviews to discuss their initial impressions. Apparently, Gibson elected not to participate actively in the Planner selection process because he had previously been informed that his own position was going to be eliminated. Nevertheless, Gib-son did provide to Humphrey *some* input on the Planners, which apparently was considered in the final analysis. When Rogers, Humphrey, and Lowers met

again, they created a forced ranking of the Planners. Allegedly, the stated goal of the ranking was to identify the Planners willing to: (1) devote the greatest amount of time and effort to their jobs; (2) go beyond their regular duties; and (3) work hours in excess of their regular workday. With these criteria in mind, [*6] the seventeen Planners were ranked: Skelton ranked eleventh and was selected for termination. On October 18, 2002, Skelton was in-formed that he would be terminated from his position effective February 28, 2003.

On April 16, 2003, Skelton filed his Complaint, asserting claims for age discrimination in violation of the ADEA and O.R.C. §§ 4112.02 and 4112.99. [1] The District Court granted summary judgment on July 31, 2006, in favor of Defendant on all of Skelton's claims. (J.A. at 117, Dist. Ct. Op. at 12; *see also Skelton v. Sara Lee Corp.*, No. 03-276, 2006 U.S. Dist. LEXIS 52482, 2006 WL 2165710, at *6 (S.D. Ohio, July 31, 2006).) Skelton timely filed his Notice of Appeal with this Court on Au-gust 24, 2006. [2]

1 In the District Court, Skelton also asserted a claim for violation of Ohio public policy. Skelton, however, does not raise this issue on appeal.

2 The District Court had subject matter jurisdiction over Skelton's federal claims pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over Skelton's state claims under 28 U.S.C. § 1367. This Court has appellate jurisdiction to review the District Court's final order pursuant to 28 U.S.C. § 1291.

II.

A. Standard of Review

[HN1] This Court reviews *de novo* the District Court's [*7] grant of summary judgment. *Briscoe v. Fine*, 444 F.3d 478, 485 (6th Cir. 2006). [HN2] A motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When faced with a summary judgment motion, a district court must view all evidence and the inferences to be drawn therefrom in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587,

106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Church-well v. Bluegrass Marine, Inc.*, 444 F.3d 898, 903 (6th Cir. 2006). The critical inquiry for a district court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

B. Evidence of Age Discrimination

[HN3] Under the ADEA, employers are prohibited from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, [*8] because of such individual's age." 29 U.S.C. § 623(a); *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 141, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (noting that a "plaintiff's age must have actually played a role in the employer's decision making process and had a determinative influence on the outcome") (citation and quotation marks omitted). An employee may establish a claim under the ADEA by offering either direct or circumstantial evidence of age discrimination. *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003) (en banc). Direct

evidence of age discrimination is "that evidence, [which] if believed, re-quires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id.* (quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)); *Rallins v. Ohio State Univ.*, 191 F. Supp. 2d 920, 928 (S.D. Ohio 2002) ("Direct evidence exists only where the unlawful discrimination is patent; it requires no inference of discrimination."). "Circumstantial evidence, on the other hand, is proof that does not on its face establish discriminatory animus, but does allow a fact finder to draw a reasonable inference that discrimination [*9] occurred." *Wexler*, 317 F.3d at 570 (citation omitted).

1. Direct Evidence

At the outset, we consider whether Skelton offered any direct evidence of age discrimination. *See id.; see also Peyton v. Kellermeyer Co.*, 115 F. App'x 825, 829 n.1 (6th Cir. 2004) [HN4] ("The dividing line between 'direct' and 'circumstantial' evidence is murky at best. 'Direct evidence' . . . has often been defined as evidence which, if believed, suffices to prove a fact at issue 'without inference or presumption.'") (citations omitted). Where a plaintiff

"succeeds in presenting direct evidence of a discriminatory motive, the burden [of production and persuasion] shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive." *Minadeo v. ICI Paints*, 398 F.3d 751, 763 (6th Cir. 2005) (citation and quotation marks omitted).

Skelton's only purported direct evidence of age discrimination is that he "was repeatedly subjected to comments by his supervisor Russ Gibson to the effect that 'Ron [Skelton] has been around since Christ was a baby.'" (Pl.'s Br. at 13.) Defendant counters that there exists no evidence that Gibson made any such comment on [*10] more than one occasion. Indeed, the District Court suggested that Gibson made this statement on a single occasion sometime in 2002, and concluded that this statement did not qualify as direct evidence of age discrimination in accordance with this Court's precedent. Specifically, the District Court noted that "a reasonable trier of fact *could* believe Mr. Gibson made this statement and still conclude Defendant's termination of Plaintiff's employment was lawful." (J.A. at 112, Dist. Ct. Op. at 7 (emphasis added) (citing *Peyton*, 115 F. App'x at 829 ("In our view, a reasonable trier of fact could believe this testimony and still conclude that [the

employee's] discharge was lawful; accordingly, the testimony does not meet the Sixth Circuit's 'direct evidence' test.")).)

Taking all inferences in the light most favorable to Skelton, we assume for the purposes of this appeal that Gibson made this comment and that he did so on multiple occasions. This Court has previously stated that [HN5] statements allegedly showing an employer's age bias are to be evaluated by considering four factors:

> (1) whether the statements were made by a decision-maker or by an agent within the scope of his employment; (2) [*11] whether the statements were related to the decision-making process; (3) whether the statements were more than merely vague, ambiguous or isolated remarks; and (4) whether they were made proximate in time to the act of termination.

Peters v. Lincoln Elec. Co., 285 F.3d 456, 477-78 (6th Cir. 2002) (noting that "none of these factors is individually dispositive of age discrimination, but rather, they must be evaluated as a whole, taking all of the circumstances into account") (citation omitted). Skelton fails to assert that Gibson's statement

satisfies any of these four factors. In fact, Skelton fails to address these factors at all. Nevertheless, even a brief examination of Gibson's statement in relation to these factors reveals that the District Court did not err in dismissing Skelton's alleged direct evidence of age discrimination.

Although he was a supervisor of the Planners, including Skelton, Gibson's influence in determining which Planners to terminate was limited. Prior to the Planners' interviews, Gibson himself was notified that his position would be eliminated. Thus, Gibson refused to be involved directly in the process of selecting which Planners were to be fired. Apparently, [*12] Gibson did provide some input to Humphrey, and Defendant acknowledges that this information was considered in the final analysis. Importantly, however, Gibson was not involved directly in the forced ranking of the Planners, a ranking which proved to be dispositive in determining which Planners would be let go.[3] Therefore, although Gibson, as a general matter, may have been a "decision-maker" in his position as a supervisor for Defendant, Skelton presents absolutely no evidence to suggest that Gibson was a decision-maker with regard to the decision to terminate Skelton's position.

3 In his deposition testimony, Gibson commented that he refused to play any kind of role in connection with deciding the fate of the other employees. "I told them that [Defendant's] letting me go and then making me choose who would stay and who would go would stick like sour grapes, I would have no part in it." (J.A. at 122) Asked whether he provided "any input whatsoever," Gibson responded that he had communicated verbally with Humphrey regarding his opinion of the Planners, "who were the go-getters, who weren't, who would take on extra responsibilities . . . when needed, who wouldn't." (*Id.* at 122-23.) Gibson [*13] testified that he refused to participate in any of the group meetings. (*Id.* at 123.) With regard to Skelton, Gibson testified that "Ron does his job but he doesn't do extra. . . . he never volunteered to go the extra leg up like [some] others." (*Id.* at 124.)

Likewise, there is no evidence that Gibson's statement was in any way *related* to Defendant's decision making process in terminating Skelton. In fact, according to Defendant, Skelton himself

acknowledged that he understood Gibson's comment "to refer to his tenure in the department rather than reflecting any age bias." (Def.'s Br. at 36; *see also* J.A. at 222 ("I would say it was more based on [my] length of service.").) Skelton does not contest this assertion. Indeed Gibson's comment is not discriminatory on its face. Perhaps, as Skelton asserts, the comment suggested that his age "was an issue." (Pl.'s Br. at 13.) However, an inferential step is necessary to equate Gibson's comment about Skelton's tenure with the department--or his age--with unlawful discriminatory animus. Even Skelton does not proffer such an argument. It is therefore reasonable to conclude that Gibson's statement was an isolated and irrelevant remark that had no [*14] influence on the termination decision. *See Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025 (6th Cir. 1993) ("[I]solated and ambiguous comments are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination.") (citation and quotation marks omitted).

Finally, the District Court indicated that Gibson made this comment sometime in 2002. The decision to terminate Skelton was made on or about October 18, 2002. Thus, although the comment and the decision to eliminate Skelton's position occurred

in the same calendar year, it is unclear whether Gibson's comment was made "proximate in time" to Defendant's decision to terminate Skelton. *See Asmo v. Keane, Inc.*, 471 F.3d 588, 600 (6th Cir. 2006) (Griffin, J., dissenting) (noting that according to earlier precedents of this Court [HN6] "temporal proximity alone cannot establish the requisite causal nexus between the employee's protected activity or status and the adverse action."). Notably, however, Skelton fails even to assert evidence that there was any temporal proximity.

Because none of the four factors, as articulated in *Peters*, weigh in Skelton's favor with regard to Gibson's comments, this Court affirms [*15] the District Court's conclusion that Skelton failed to proffer any direct evidence of age discrimination.

2. Circumstantial Evidence

This [HN7] Court is guided by the *McDonnell Douglas* burden-shifting framework to analyze age discrimination claims based upon circumstantial evidence. *Wexler*, 317 F.3d at 574 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)). First, an employee must establish a prima facie case of age discrimination. *Id.* Once an employee satisfies this burden, the burden of

production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350 (6th Cir. 1998). If the employer is able to do so, the burden shifts back to the employee to rebut the employer's proffered reason by showing by a preponderance of the evidence that the employer's articulated reason was a pretext for intentional age discrimination. *Id.* Importantly, the burden of persuasion remains on the employee. *Reeves*, 530 U.S. at 143. However, the employer's alleged nondiscriminatory reason for taking an adverse employment action may not be considered by a court when analyzing the prima facie case. [*16] *Wexler*, 317 F.3d at 574 ("To do so would bypass the burden-shifting analysis and deprive the plaintiff of the opportunity to show that the nondiscriminatory reason was in actuality a pretext designed to mask discrimination.").

a. Prima Facie Case

[HN8] Pursuant to the *McDonnell Douglas* formula, to establish a prima facie case of age discrimination, an employee must show the following elements: (1) he was a member of the protected class (i.e., age 40 or over); (2) he was qualified to perform

the job; (3) he was subject to an adverse employment action; and (4) he was replaced by a younger individual. *Scott v. Goodyear Tire & Rubber Co.*, 160 F.3d 1121, 1126 (6th Cir. 1998); *see also Cicero v. Borg-WarnerAuto., Inc.*, 280 F.3d 579, 588 (6th Cir. 2002) (noting that "[a] presumption of discrimination arises when a plaintiff establishes a prima facie case under the first stage of the *McDonnell Douglas* test"). However, as the District Court recognized, where an employee's position is eliminated pursuant to a reduction in force ("RIF") or reorganization, the analysis with regard to the fourth element differs because the employee is not replaced. (J.A. at 112, Dist. Ct. Op. at 7 (citing *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 371 (6th Cir. 1999)); [*17] *see also Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1464-65 (6th Cir. 1990).) By showing only the first three elements of the *McDonnell Douglas* formula, an employee "has not presented any evidence indicating that the work force reductions are not the reasons for the discharge." *Barnes*, 896 F.2d at 1465 (noting that in RIF cases "'the most common legitimate reasons' for the discharge are the work force reductions" themselves); *see also id.* ("A different result would allow every person age 40-and-over to establish a prima facie case of age discrimination if he or she

was discharged as part of a work force reduction."). Thus, in a RIF or reorganization case, the employee "does not make out a prima facie case absent additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Id.* (hereinafter "the fourth element" or "the *Barnes* additional evidence requirement"); *see also Asmo v. Keane, Inc.*, 471 F.3d 588 (6th Cir. 2006) ("The purpose of the additional evidence requirement is to ensure, in [RIF] cases, that the plaintiff has presented evidence to show that there is a chance that the reduction [*18] in force is not the reason for the termination."); *Ercegovich*, 154 F.3d at 350 (citing *Barnes*).

The parties agree that Skelton satisfies the first three elements of the prima facie showing. (*See* Def.'s Summ. J. Br. at 8, J.A. at 29 ("To be clear, Sara Lee's management never believed that Skelton was a bad planner, or that he lacked the skills and knowledge to do the job.").) Skelton, however, argues that the District Court improperly determined that he failed to satisfy the fourth element of the prima facie showing. For the purpose of this appeal, we assume, without deciding, that Skelton indeed established the fourth element of the prima facie

showing, and thus satisfied the first prong of the *McDonnell Douglas* burden-shifting framework. Yet, as is discussed in greater detail below, we affirm the District Court's grant of summary judgment pursuant to the third prong of the *McDonnell Douglas* framework because Skelton has not shown that Defendant's articulated reason for terminating his position was a pretext designed to mask age discrimination.

Although, as noted, we assume that Skelton established a prima facie case of age discrimination, and specifically the *Barnes* additional evidence [*19] requirement, we find it appropriate to address briefly the District Court's prima facie analysis. Skelton argues on appeal that, when the evidence is viewed in the light most favorable to him and without consideration of Defendant's self-serving evaluation criteria, the District Court should have determined that he established the fourth element of the prima facie case of age discrimination due to the substantial evidence that Defendant retained less qualified employees than he. *See Barnes*, 896 F.2d at 1466 ("[A] plaintiff could establish a prima facie case by showing that he or she possessed qualifications superior to those of a younger co-worker working in the same position as the plaintiff."); *Williams v. GE*,

269 F. Supp. 2d 958, 967 (S.D. Ohio 2003) ("To meet the heightened *prima facie* requirement in a RIF case . . . Plaintiff in this case could present evidence that he was more qualified than the younger workers [the employer] did not terminate.") (citing *Barnes*); *but see Brocklehurst v. PPG Indus., Inc.*, 123 F.3d 890, 896 (6th Cir. 1997) ("In a RIF, qualified employees are going to be discharged."). Defendant, however, asserts that after the centralization in 2000, [*20] the Planners located in the Spring Grove facility began to be responsible for planning the distribution of all of Defendant's brands from the five mixing centers to Defendant's grocery store customers. Thus, after the centralization, Defendant asserts that Skelton "began performing an essentially new job." (Def.'s Br. at 5.)

After considering this issue, the District Court concluded that Skelton's "assertion that he had better qualifications than the other candidates is not sufficient to establish the fourth prong." (J.A. at 116, Dist. Ct. Op. at 11.) According to the District Court, this is because "the [proper] inquiry is 'whether the other candidates are more qualified *with respect to the criteria that [Defendant] actually employs.*'" (J.A. at 116-17, Dist. Ct. Op. at 11-12 (emphasis added) (citing *Coleman v. Quaker Oats Co.*, 232 F.3d 1271,

1285 (9th Cir. 2000)).) To support this conclusion, the District Court offered the following discussion, quoted below in its entirety.

> [W]ith respect to Plaintiff's allegation that less experienced employees were retained, Defendant, in determining who to retain, did not emphasize experience, knowledge or tenure. Instead, Defendant focused on the [*21] planners who were willing to put forth the greatest amount of time and effort into the position. The Transportation Department was in a crisis due to the failure of the reorganization and Defendant needed planners who would work as long as necessary to [make] reorganization a success. In evaluating Plaintiff, it was determined his work habits did not mesh with Defendant's needs. Instead, he "did his eight-hour day and went home". Further, he "did his job. But frankly, that's all he did, was his job. A lot of people were showing themselves to take on a lot more responsibility than just their jobs, which was what was needed." Moreover, the reviewers "didn't see any evidence that [Plaintiff] was working with other people, that he would do more than what the specific request was."

(J.A. at 116, Dist. Ct. Op. at 11 (emphasis added) (citations omitted).) In other words, after considering Defendant's stated criteria to evaluate the Planners, i.e., allegedly desiring "the Planners who were willing to put forth the greatest amount of time and effort into the position," the District Court determined that Skelton's alleged "experience" was not necessarily consistent with Defendant's hiring goals. [*22] Thus, according to the District Court, Skelton's substantial experience as a Planner as compared to the retained Planners was insufficient to satisfy the fourth element of the prima facie case. Although the District Court arrived at the correct result--that Skelton's age discrimination claims could not survive summary judgment--it committed an error in its analysis of the "qualifications" issue at the first stage of the *McDonnell Douglas* burden-shifting framework.

In an *en banc* decision in *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564 (6th Cir. 2003), this Court instructed that [HN9] an employer's alleged nondiscriminatory reason for taking an adverse employment action may not be considered by a court when analyzing the prima facie case. *Id.* at 574. That is, a court must sustain clear boundaries when assessing the three stages of the *McDonnell Douglas* burden-shifting analysis. *Peters*, 285 F.3d at 473

("[T]he legitimate non-discriminatory reason offered by the employer at the second stage of the *McDonnell Douglas* inquiry may not be considered in determining whether the employee has produced sufficient evidence to establish a prima facie case.") (citing *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 660 (6th Cir. 2000)). [*23] To do otherwise, Skelton correctly asserts, could "wrongly collapse[] the final stages of the burden shifting analysis into the evaluation of the plaintiff's *prima facie* case." (Pl.'s Br. at 24.) However, in its assessment of the fourth element of the prima facie case--the first stage of the burden-shifting analysis--the District Court improperly viewed Skelton's asserted superior experience through the prism of Defendant's alleged nondiscriminatory retainment criteria. In other words, the second and third stages of the *McDonnell Douglas* burden-shifting analysis were--but should not have been--addressed by the District Court during its discussion of the first stage of the burden-shifting analysis. [4] Thus, the District Court improperly considered the Defendant's alleged nondiscriminatory reason for taking an adverse employment action when it analyzed Skelton's prima facie case.

> 4 Of course, the District Court was free to separately analyze the second and third stages of the *McDonnell Douglas* burden-shifting analysis. However, to avoid collapsing the final stages of the analysis into the evaluation of the prima facie case, the District Court should only have considered the second and third [*24] stages if: (1) it found that Skelton established a prima facie case, or (2) if it discussed the later stages under the aegis of an alternative finding, e.g., "even if Skelton were deemed to have established a prima facie case of discrimination . . . ." However, the District Court neither made such a finding nor presented such an alternative finding.

Skelton himself adds to this confusion when he argues that "he was more qualified by [] *Sara Lee's own standards* than numerous retained employees" at the time of the RIF. (Pl.'s Br. at 16 (emphasis added).) Thus, Skelton himself contradicts his argument that the District Court failed to heed *Wexler*. Moreover, Skelton does not even articulate what exactly he means by "Sara Lee's own standards," although the most likely meaning of "standards" in this context is the Defendant's alleged

nondiscriminatory reason for taking an adverse employment action, i.e., invoking the second stage of the *McDonnell Douglas* burden-shifting analysis. Thus, this quotation suggests that at the prima facie stage, even Skelton evaluated his qualifications in light of Defendant's standards, or at least his perception of them. However, Skelton's invocation of Defendant's [*25] "own standards" does not alter the requirement as discussed in *Wexler* that a purported prima facie case be analyzed without consideration of the employer's alleged nondiscriminatory reason for terminating the position.

Notwithstanding the District Court's error with regard to the first stage of the *McDonnell Douglas* burden-shifting framework, we will affirm the District Court's grant of summary judgment in favor of Defendant. We assume that Skelton has established a prima facie case of age discrimination but, as discussed below, he has not met his burden to show pretext.

b. Legitimate Nondiscriminatory Reason for Termination

Where an employee establishes a prima facie case of age discrimination--which, as noted above, we assume here for the present purposes--then under the

McDonnell Douglas framework, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. *Wexler*, 317 F.3d at 574. Here, Defendant asserts that "it sought to retain Planners who demonstrated a willingness to put in as much time and effort as necessary, and go beyond the traditional job requirements, in order to meet the needs of the business." (Def.'s Br. at [*26] 40.) Defendant allegedly was in desperate need of Planners with such characteristics "because the centralization of the transportation department was such a disaster, [and] management was under great pressure to restructure the department in a manner that would address the customer service problems emanating from the department." (*Id.* at 7 (noting further that "the department was in a crisis mode, and the jobs of the managers were at stake in making a second reorganization work").) According to Defendant, Skelton "simply did not demonstrate such characteristics." (*Id.*) Defendant presented deposition testimony from Humphrey and Gibson who both indicated that Skelton was less willing than other Planners to go beyond the basic requirements of the position. Defendant also cites Skelton's last performance appraisal prior to the RIF, in which

Gibson recorded that Skelton "does not stretch beyond his day-to-day duties," as he "[t]ends to operate in his own silo of responsibility, unless asked." (Def.'s Br. at 16; J.A. at 232.) Although Defendant's alleged evaluation criteria is not immune from reproach, we find that Defendant has met its burden of production by putting forth a legitimate, [*27] non-discriminatory reason for Skelton's termination.

c. Pretext

Lastly, if an employer is able to articulate some legitimate, nondiscriminatory reason for its actions, the burden shifts back to the employee to rebut the employer's proffered reason by showing by a preponderance of the evidence that the employer's articulated reason was a pretext "designed to mask age discrimination." *Wexler*, 317 F.3d at 574. As the District Court noted, [HN10] a plaintiff may prove pretext by showing that the employer's proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged con-duct, or (3) was insufficient to motivate the employer's challenged conduct. *Id.* at 576; *see also Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994) (noting that the first and third "types

of rebuttals are direct attacks on the credibility of the employer's proffered motivation for firing plaintiff and, if shown, provide an evidentiary basis for what the Supreme Court has termed a 'suspicion of mendacity'"). Skelton does not specifically articulate how his alleged evidence demonstrates pretext under any of these types of rebuttals. Nevertheless, it is helpful to address [*28] Skelton's argument in the context of these particular showings.

"The first type of rebuttal . . . consists of evidence that the reasons given by the employer simply did not happen." *Peters,* 285 F.3d at 471. Here, although Skelton challenged, as an analytical matter, whether the termination of Planners should be characterized as a RIF, Skelton does not argue that his position was terminated pursuant to Defendant's efforts to decentralize. Skelton also does not contest that Defendant's decision to reduce its workforce was based upon a legitimate business decision. Thus, Defendant's reason for including Skelton in the RIF is clearly based in fact.

Taken out of order, "[t]he third type[] ordinarily consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the

employer contends motivated its discharge of the plaintiff." *Id.* at 471-72 (citation and quotation marks omitted). Skelton spends a good deal of time in his brief discussing how several of the retained Planners were, in his estimation, less qualified than Skelton. However, Skelton does not assert that any of these [*29] Planners exhibited an unwillingness to "put in as much time and effort as necessary, and go beyond the traditional job requirements[] in order to meet the needs of the business." (Def.'s Br. at 40.) In other words, Skelton proffers no evidence that the retained Planners were deficient with regard to Defendant's asserted non-discriminatory reason for the employees' termination. Moreover, it is Skelton's burden, not Defendant's, to show that he was superior to a retained employee with regard to Defendant's asserted criteria. Thus, Skelton has not carried his burden to show that Defendant's proffered reason was insufficient to motivate its termination decisions.

Lastly, Skelton can show pretext under the second type of rebuttal by showing that Defendant's proffered reason "did not actually motivate" its decision to terminate Skelton's position. Although he does not denote his arguments as such, Skelton asserts at least three identifiable grounds to

establish pretext under this rebuttal type: (1) Defendant utilized inconsistent criteria to select Skelton for termination; (2) Defendant had made its decision to terminate Skelton prior to the interviews; and (3) Defendant did not utilize performance [*30] reviews or objective data in the decision-making process. For the following reasons, Skelton has failed to present sufficient evidence that Defendant's asserted justification demonstrates pretext, or that it lacks credibility. *See Reeves*, 530 U.S. at 149 (holding that [HN11] "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated") (emphasis added).

This Court has recognized that "[a]n employer's changing rationale for making an adverse employment decision can be evidence of pretext." *Asmo*, 471 F.3d at 596. In this vein, Skelton argues that despite its claims to the contrary, Defendant actually sought employees who possessed different characteristics than simply willingness to work long hours. For example, Defendant allegedly "sought to retain the best Planners who could best service the customers and those where were the best performers." (Pl.'s Br. at 31.) Defendant, however,

consistently argues that it sought to retain those Planners who were willing to work long hours and do more than the basic requirements of the job. Skelton has therefore [*31] identified a factual dispute: whether Defendant consistently used the same criteria to determine which Planners to retain. However, this factual dispute is not material. Even if, as a practical matter, Defendant's evaluation criteria were not strictly limited to the stated criteria, it does not mean that the evaluation system that was applied was itself discriminatory. *See Smith*, 195 Fed. Appx. at 396 (noting that "the fact that [an] evaluation system used may not have been the best tool for evaluating employee performance does not show that the RIF based on evaluations made under that system was not proper"). For example, Skelton does not argue that Defendant ever considered age as a relevant factor in its evaluation process of the Planners. As the Supreme Court articulated in *St. Mary's Honor Center v. Hicks*, "[i]t is not enough . . . to *dis* believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination." 509 U.S. 502, 519, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) (emphasis in original). Here, although there may be *some* evidence to show that Defendant did not rely solely on the criteria that it

proffers, Skelton simply has produced no evidence that Defendant utilized any [*32] alternate criteria that implicated intentional age discrimination.

Skelton next argues that the interviews "were clearly a sham." (Pl.'s Br. at 32.) Skelton complains about the chronology of Defendant's decision-making process, noting specifically that the decision to terminate his position had been made prior to the interviews. Even if this Court assumes that Defendant made the decision to eliminate Skelton prior to the interviews, it does not necessarily follow, or even suggest, that Defendant targeted Skelton because of his age. *See, e.g., Hooper v. Cargill, Inc.*, 187 F.3d 635, 1999 WL 552560, at *5 (6th Cir. 1999) (per curiam) (table). After all, Skelton had been working as a Planner for Defendant for more than 17 years. It is reasonable to assume that, prior to his actual interview, Defendant was sufficiently aware of Skelton's professional proclivities to support an informed evalua-tion of him with regard to the stated criteria. Thus, even if Skelton could show that prior to his interview Defendant had decided that he would be terminated, it simply does not bear upon the question of whether Defendant discriminated based on age.

Finally, Skelton asserts that Defendant did [*33] not utilize performance reviews or objective data in the deci-sion-making process. For example, Skelton notes that "the interview forms for retained Planners were nearly devoid of notes, whereas the forms for the terminated Planners were fully completed." (Pl.'s Br. at 32.) Apart from the interview forms of Christen Baum and Mike Jones, two Planners who were retained and whose forms were filled with notes, Skelton's assertion is largely true. The interview forms of nearly every dismissed Planner were filled with notes, while the forms of most of the retained Planners had few or no notes. However, even if we assume that Defendant's evaluation process was hap-hazard--at least as it pertained to note-taking during the interviewing process--there exists no reasonable infer-ence that Defendant discriminated on the basis of age. *See Coleman*, 232 F.3d at 1285 ("That [the employer] made unwise business judgments or that it used a faulty evaluation system does not support the inference that [it] discriminated on the basis of age."); *Peters*, 285 F.3d at 470 [HN12] ("[M]ere conjecture that the employer's ex-planation is a pretext for intentional discrimination is an insufficient basis for denial of summary [*34] judg-ment.") (citation and

quotation marks omitted). For ex-ample, Skelton asserts no correlation between interview forms that were filled out and the respective ages of the Planners. In fact, of the Planners who were dismissed and whose interview forms were copiously filled, approximately half of them were under the age of 40. Thus, Defendant's evaluation process may have been imperfect, but it does not suggest that the process was itself dis-criminatory on the basis of age.[5] For the foregoing reasons, when viewing all the evidence in the light most favorable to Skelton, we find that there exist no genuine issues of material fact.

5 Although all of the retained Planners were younger than Skelton, the fact remains that the average age of the Planners decreased minimally after the decentralization (from 37.79 prior to the RIF, to 36.84 after the RIF), and three of the retained Planners (Beverly Fitch, 45.15 years old; Marketta Hayes, 44.92; and Christen Baum, 43.24) were within the protected class and not substantially younger than Skelton, age 46.22, when his position was terminated.

Accordingly, Skelton has failed to show by a preponderance of the evidence that Defendant's articulated [*35] reason was a pretext "designed to mask age discrimination." *Wexler*, 317 F.3d at 574. Therefore, we will affirm the District Court's decision to grant summary judgment in favor of Defendant because Skelton has not satisfied the third stage of the *McDonnell Douglas* burden-shifting framework.

C. State Law Claims

The District Court did not address Skelton's state law claims. However, this was not inappropriate. This Court has acknowledged that [HN13] when "analyzing claims arising under Ohio Rev. Code § 4112, Ohio courts have adopted the framework established in federal case law concerning Title VII and the [ADEA]." *Peters*, 285 F.3d at 469. Thus, Skelton's state law claims rise and fall with his federal claims. For the reasons stated above with regard to Skelton's ADEA claims, his state law claims were properly dismissed.

III.

Although we base our decision on the third stage of the *McDonnell Douglas* burden-shifting framework, we **AFFIRM** the District Court's grant of

summary judgment in favor of Defendant with regard to Skelton's federal and state law claims.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Ronald D. Skelton,
Plaintiff,

Case No. 1 :03cv276
v. **Judge Michael H. Watson**

Sara Lee Corp.,
Defendant.

OPINION AND ORDER

Before the Court is the December 15, 2004 Motion of Defendant Sara Lee Corporation (hereinafter "Defendant") for Summary Judgment (Doc. 53). Plaintiff Ronald D. Skelton (hereinafter "Plaintiff) filed a Response in Opposition on December 21, 2004 (Doc. 55). Defendant filed a Reply Memorandum on December 30, 2004 (Doc. 56).

This matter is now ripe for review. For the reasons stated herein, Defendant's Motion for Summary Judgment is hereby **GRANTED**.

I. FACTS

Defendant manufactures and markets various brand-name food products, such as Hillshire Farms, Sara Lee, Jimmy Dean and Ballpark. Plaintiff began working for Defendant in 1979 in quality control. (Plaintiff Depo. p. 14) In June, 1980, he became a distribution supervisor, a position he held until he became a load planner (hereinafter "planner") in January, 1985. (*Id.* pp. 14-15) Plaintiff was a planner in Defendant's Transportation Department until his termination. (*Id.* p. 15)

Prior to 2000, Defendant's nine primary brands were decentralized, operating as nine independent companies. (Rogers Aff. ¶7, Doc. 53, Exh. A) Beginning In 2000, to improve efficiency and provide better customer satisfaction, Defendant drastically changed the way it did business. (*Id.* ¶9) The biggest change was the consolidation its business into a single corporate headquarters in Blue Ash, Ohio, resulting in nine separate companies operating as one. (*Id.*¶10)

At this time, Defendant also centralized its transportation function, including the planner position, into its Spring Grove, Ohio (hereinafter "Spring Grove") facility. This resulted in the elimination of the planner position at production

facilities and several planners were laid-off. (*Id.* 11) However, Defendant hired nine new planners in Spring Grove during the first half of 2002. (Gibson Dep., p. 28)

The Transportation Department is responsible for:

(1) the distribution of products from the various production facilities to one of the five regional warehousing and distribution facilities known as "mixing centers"; and

(2) the combination of product at the mixing center onto truckloads for shipment to customers.

(Rogers Aff. ¶4) A planner's job is to ensure these functions are carried out to meet customer expectations at the lowest possible cost. One of the principal duties of a planner is "building loads", which is selecting the carrier for each shipment and the most efficient arrangement of orders on the trucks. (*Id.*¶5) A planner is also responsible for addressing problems such as carrier delays, miscommunications and rush orders. (*Id.* ¶6)

At the time of Defendant's centralization, Plaintiff worked at the Spring Grove facility and, as

such, his position was not eliminated. (*Id.*, ¶13; Plaintiff Dep. pp. 25-26) Thus, he began working in the new, centralized Transportation Department, performing an essentially new job planning the distribution of all of Defendant's brands from the five mixing centers to Defendant's grocery store customers. (*Id.*¶14, pp. 25-27)

The centralization of the transportation function was problematic. The planners operating remotely from Spring Grove made it difficult to manage the numerous problems which arose daily. Instead of the planners dealing with problems on site, as it was prior to centralization, they were dealing with them by phone and email. (Rogers Aft. ¶17) The new way to deal with problems proved ineffective. (*Id.* ¶18) The problems with the new system quickly became acute and Defendant determined the best way to address it was to station planners on-site at the mixing centers, rather than operating remotely from Spring Grove. (*Id.* ¶20)

Thus, in the fall of 2002, Defendant returned to decentralized load planning by relocating to the five mixing centers the load planning positions. (*Id.* 22) When Defendant made this decision, there were 17 planners at the Spring Grove facility and several positions needed to be eliminated. (*Id.* ¶21-22)

In the beginning of October, 2002, Larry Rogers, Vice President of Transportation, discussed the decentralization of the load planning function with Phil Lower, Russ Gibson and Joyce Humphrey. (Lower Dep: pp. 96-97) Mr. Lower was a consultant hired to address problems in the department who had worked directly with several planners in the preceding months. (*Id.*, pp. 22-24, 64-67) Mr. Gibson and Ms. Humphrey were managers who directly supervised the planners, including Plaintiff. (Gibson Dep., p. 18; Humphrey Dep., pp. 53-56)

On October 7,2002, Mr. Rogers, along with Monica Mehta, Defendant's Human Resources Manager, met with the entire Transportation Department to inform them of the decision to decentralize. (Skelton Dep., pp. 34-36) Mr. Rogers explained that several planner positions would be eliminated in Spring Grove and new planners would be hired in the regional mixing centers. (Mehta Depo., pp. 25-26) Mr. Rogers informed the planners that Defendant would retain those who were willing to take on as much work and responsibility as needed to ensure the department's success. (Gibson Dep., p. 52) Further, he informed the planners they would be required to interview for the positions which would remain in Spring Grove and that those who were not

retained could apply for the positions being created at the mixing centers. (Mehta Dep., pp. 2526; Rogers Dep., pp. 49-50)

During the next week, Mr. Rogers and Ms. Humphrey interviewed each of the planners. (Humphrey Dep., pp. 48-51) Messrs. Rogers and Lowers and Ms. Humphrey met after the interviews to discuss their initial impressions. (*Id.*, p. 58; Rogers Dep, p. 59) By this time, Defendant informed Mr. Gibson his position was being eliminated and he expressed a desire not to take an active role selecting which planners to retain. (Gibson, pp. 48-49) Nonetheless, Mr. Gibson provided input on the planners to Ms. Humphrey, which was considered in the final analysis. (*Id.*, pp. 48-49; Humphrey Dep., pp. 42-44).

Messrs. Rogers and Lowers and Ms. Humphrey met again to determine which planners to retain. (Humphrey Dep., pp. 42-43; 58-59) A forced ranking was done with the goal of identifying the planners who were:

1. willing to devote the greatest amount of time and effort to their jobs;
2. go beyond their regular duties; and
3. work hours in excess of their regular workday.

(Rogers Aff. ¶24; Rogers Dep., pp. 58-60; Humphrey Dep., pp. 42-43) After several hours, a final list was developed which ranked the planners. (Humphrey Dep., pp. 40- 43; Rogers Dep., pp. 44-45; Exh 1) Plaintiff was selected for termination.

On October 18, 2002, Plaintiff was notified he would be terminated from this position effective February 28, 2003. At the time of his termination he was 46 years old.

Plaintiff filed the instant action on April 16, 2003, asserting claims for age discrimination in violation of the ADEA, in violation of O.R.C. §§4112.02 and 4112.99, and Ohio public policy.

II. ANALYSIS

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(C). The moving party has the burden of showing an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met its

burden of production, the non-moving party cannot rest on his pleadings. but must present significant probative evidence in support of his complaint to defeat the motion for summary judgment *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The mere existence of a scintilla of evidence to support the non-moving party's position will be insufficient; the evidence must be sufficient for a jury to reasonably find in favor of the non-moving party. *Id.* at 252.

B Age Discrimination

The ADEA provides: "It shall be unlawful for an employer ... to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C.§ 623. To prevail in an action under the ADEA, a plaintiff must show his age had a "determinative influence on the outcome" of the employment decision. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000), *quoting, Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

In a case alleging employment discrimination in violation of the ADEA, a plaintiff can withstand a motion for summary judgment by presenting either direct evidence of discrimination or circumstantial

evidence from which a jury may infer a discriminatory motive. *Rallins v. Ohio State University*, 191 F.Supp.2d 920, 928 (S.D. Ohio 2002), *citing Kline v. Tennessee Valley Authority*, 128 F.3d 337, 348-49 (6th Cir. 1997). Direct evidence of discrimination is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Wexler v. White's Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003) (en bane). (internal quotation marks omitted).

Plaintiff contends he has direct evidence of age discrimination. Specifically, he asserts in 2002, Mr. Gibson, Plaintiffs supervisor stated on one or more occasions words to the effect that "Ron had been around since Christ was a baby." (Gibson Dep., p. 65; Plaintiff Dep., 49) Upon consideration, the Court concludes a reasonable trier of fact could believe Mr. Gibson made this statement and still conclude Defendant's termination of Plaintiffs employment was lawful. *See Peyton v. Kellermeyer Co.*, 115 Fed. Appx. 825, (6th Cir. 2004) (comments by owner of business that plaintiff wanted to retire because he was "getting too old" was not sufficient to establish direct evidence). Accordingly, this testimony fails to meet the Sixth Circuit's "direct evidence" test.

A discrimination claim presented by circumstantial evidence is to be analyzed using the burden-shifting approach set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). First, a plaintiff bears the burden of proving a prima facie case of discrimination by establishing:

1. he is a member of a protected class;
2. he suffered an adverse employment action;
3. he was qualified for the position in question; and
4. he was replaced by a person outside of the protected class.

Smith v. City of Salem, Ohio, 378 F.3d 566, 570 (6th Cir. 2004), *citing Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-583 (6th Cir. 1992).

However, when an employee is terminated pursuant to a reduction in force (hereinafter "RIF"), the *McDonnell Douglas* framework is altered. *See Barnes v. GenCorp, Inc.* 896 F.2d 1457, 1465, n.1 (6th Cir. 1990). Specifically, the fourth element is modified because the employer does not replace the employee. *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365,371 (6th Cir. 1999) As such, the plaintiff must present "additional direct, circumstantial, or

statistical evidence tending to indicate that the employer singled out [the plaintiff] for discharge for impermissible reasons." *Id., quoting Barnes* at 1465. This "extra" evidence must be "sufficiently probative" to permit the fact finder to believe the defendant intentionally discriminated against the worker. Barnes at 1466.

Upon establishing a *prima facie* case, an inference of discrimination arises, and the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for its actions. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981).[1] If defendant provides a legitimate nondiscriminatory reason, the burden shifts back to plaintiff to demonstrate the offered reason is pretextual. *McDonnell Douglas* at 804-805. The plaintiff may prove pretext by showing either that:

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[1]It should be noted. the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine* at 253. The *prima facie* case merely serves to raise a rebuttable presumption of discrimination by "eliminating the most common nondiscriminatory reasons for the [employer's treatment of plaintiff]," *Id.* at 254, and not to satisfy the plaintiffs ultimate burden of persuasion.

1. the proffered reason had no basis in fact,
2. the proffered reason did not actually motivate the adverse action, or
3. the proffered reason was insufficient to motivate the adverse action.

Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1084 (6th Cir.1994).

The first issue to resolve is whether the heightened RIF standard under *Barnes* applies currently. Plaintiff argues it does not as Defendant eliminated seven planner positions in Spring Grove and moved the jobs elsewhere. However, Defendant contends that as the planner positions were relocated from one location to another, the RIF standard does apply. Defendant relies on *Allen v. Diebold, Inc.*, 33 F.3d 674 (6th Cir. 1994), in support.

Upon review, the Court concludes the heightened RIF standard established in Barnes applies to the current circumstances. In *Allen*, Diebold closed two Ohio plants and opened plants in Virginia and South Carolina. The *Allen* court, in determining the *Barnes* standard was helpful, opined:

> Although plant closing and relocations are factually distinct from a reduction in force situation, we think the standard articulated in Barnes is

> somewhat helpful. Instead of showing direct, circumstantial or statistical evidence that older workers were discharged while younger workers were retained, plaintiffs in a plant closing case must show that an employer's decisions regarding which factories to close or downsize were based on consideration of the ages of the workers at those factories.

Id., at 678. As such, as argued by Defendant, the principles advanced by the Allen court are relevant here. Defendant did not replace Plaintiff's position in Spring Grove. Instead, Defendant eliminated the positions in Spring Grove and relocated them to other facilities around the country to be more efficient. As such, the Court will analyze Plaintiff's *prima facie* case pursuant to the *Barnes* standard.

The parties do not dispute Plaintiff establishes the first three elements of the *McDonald Douglas* test. Instead, the issue is whether Plaintiff presents "additional direct, circumstantial, or statistical evidence tending to indicate that Defendant singled him out for discharge due to his age."

Plaintiff argues age-related bias in the selection process is evidenced by the fact he was more qualified than the younger planners who were

retained. Plaintiff contends he was with the company for over 23 years, over 17 years as a planner. In contrast, Plaintiff argues of the planners who were retained, the most senior had less than three years of experience as a planner. As such, Plaintiff asserts he was more qualified than the planners who were retained.

In reviewing the ages of the planners who were retained, all were younger than Plaintiff, however, three of the eight were within the protected group. "[T]he fact that a younger ... employee was retained while Plaintiff was terminated, taken alone, is simply insufficient to establish discriminatory motives." *Brown v. EG&G Mound Applied Techs., Inc.*, 117 F. Supp. 2d 671, 678 (S.D. Ohio 2000). Instead, Defendant must present evidence of age-related bias in the selection process. *Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414,422. As such, Plaintiff must establish some nexus between the actions of the employer and the employee's age. The bald assertion that a nexus exists is insufficient. *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 819 (5th Cir. 1996), cited in *EEOC v. Texas Instrument, Inc.*, 100 F.3d 1173, 1182.

Upon review, the Court concludes Plaintiff fails to establish the fourth prong of the *prima facie*

case. The record is simply devoid of evidence of age-related bias in the selection process; of a connection between Plaintiffs age and the decision to terminate Plaintiffs employment. As argued by Defendant, Plaintiff fails to come forward with any evidence he was singled out for discharge because of his age. While Plaintiff finds fault with the selection process by relying upon the disparity in experience and discussing the performance issues of the planners who were retained, this evidence simply suggests the process employed by Defendant was imperfect. *See e.g., Cindea v. Jackson Twp.*, No. 97-3280, 1998 U.S. App. Lexis 2748 (6th Cir., Feb. 17, 1998) (evidence that a rating system was imperfect, without more, does not create an inference of nefarious motivation); *Cotton v. City of Alameda,* 812 F.2d 1245, 1249 (9th Cir. 1987) ("the ADEA does not make it unlawful for an employer to do a poor job of selecting employees. It merely makes it unlawful to discriminate on the basis of age."). While Plaintiff points to flaws in the selection process, he fails to identify a basis for an inference that a prohibited factor may have contributed to her selection. *See Skalka,* 178 F.3d at 422.

Moreover, with respect to Plaintiffs allegation that less experienced employees were retained,

Defendant, in determining who to retain, did not emphasize experience, knowledge or tenure. Instead, Defendant focused on the planners who were willing to put forth the greatest amount of time and effort into the position. The Transportation Department was in a crisis due to the failure of the reorganization and Defendant needed planners who would work as long as necessary to reorganization a success. (Humphrey Dep., pp. 42-44,56; Gibson Dep., p. 52, 59-60, 77-79; Rogers Aff.¶¶23-24) In evaluating Plaintiff, it was determined his work habits did not mesh with Defendant's needs. Instead, he "did his eight-hour day and went home". (Humphrey Dep., p. 56) Further, he "did his job. But frankly, that's all he did, was his job. A lot of people were showing themselves to take on a lot more responsibility than just their jobs, which was what was needed." (Gibson Dep., p. 75) Moreover, the reviewers "didn't see any evidence that [Plaintiff] was working with other people, that he would do more than what the specific request was." (Lower Dep., pp.75-76) Plaintiff's assertion that he had better qualifications than the other candidates is not sufficient to establish the fourth prong as the inquiry is "whether the other candidates are more qualified with respect to the criteria that [Defendant] actually employs." *Coleman*

v. Quaker Oats Co., 232 F.3d 1271, 1285 (9th Cir. 2000), *quoting Cotton*, 812 F.2d at 1249.

Accordingly, construing the evidence in a light most favorable to Plaintiff, the Court concludes he fails to present additional circumstantial or statistical evidence which tends to indicate Defendant singled him out for discharge because of his age.

C. Ohio Public Policy

Plaintiff's public policy claim for age discrimination necessarily fails as he is unable to establish a statutory claim. *Hausler v. General Electric Co.*, 2005 U.S. App. Lexis 10983 (6th Cir. June 9, 2005).

III. CONCLUSION

Reviewing the evidence in a light most favorable to Plaintiff, the Court finds that summary judgment is appropriate. The record does not support a finding that Plaintiff was terminated by Defendant based upon age. Accordingly, the December 15, 2004 Motion of Defendant for Summary Judgment (Doc. 53) is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ Michael H. Watson
Michael H. Watson, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

JUDGMENT IN A CIVIL CASE

Ronald D. Skelton,
Plaintiff,

v. **Judge Michael H. Watson**
Case Number 1 :03cv276

Sara Lee Corporation,
Defendant.

[] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED
that pursuant to the July 31, 2006

Opinion and Order, final judgment is granted in favor of defendants.

Date: **July 31, 2006** **James Bonini, Clerk**

/s/ Karen S. Waldrop
Karen S. Waldrop/Deputy Clerk